AZAHAN MOHD AMINALLAH

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDDIN TENGKU MAHMUD JCA
[CRIMINAL APPEAL NO: C-09-13-2000]
25 OCTOBER 2004

CRIMINAL PROCEDURE: *Charge - Several charges at one trial - Accused charged and tried at one trial for four separate acts of rape allegedly committed over period of five years - Whether a violation of s. 164(1) Criminal Procedure Code - Whether trial rendered a nullity - Whether a mere irregularity or an incurable illegality - Whether conviction should be quashed and sentence set aside - Whether retrial appropriate*

CRIMINAL PROCEDURE: *Trial - Duty of court - Accused unrepresented by counsel - Accused making unsworn statement from dock - Duty of court to explain to accused principal points of prosecution's case against him - Consequence of failure to explain - Whether accused seriously prejudiced - Criminal Procedure Code, s. 257(1)*

EVIDENCE: *Similar facts - Reference to past criminal acts - Accused charged with rape - Prosecution adducing evidence of previous acts of sexual intercourse between accused and complainant without leave of the court - Whether highly prejudicial to accused - Whether trial judge should have intervened at once and asked prosecution to justify - Trial judge did not balance probative value of similar fact evidence against its prejudicial effect - Whether a serious misdirection occasioning miscarriage of justice - Whether conviction unsafe - Evidence Act 1950, ss. 14 and 15*

CRIMINAL PROCEDURE: *Trial - Adjournment - Accused seeking second postponement to engage advocate - Accused unrepresented - Counsel assigned by Legal Aid Bureau not present in court - Whether trial judge should have granted adjournment - Whether should have proceeded with trial*

WORDS & PHRASES: *"elects to give evidence" - Criminal Procedure Code, s. 257(1) - Whether 'making an unsworn statement from the dock' is equivalent to 'giving evidence'*

The accused was charged under s. 376 of the Penal Code for raping his 15-year-old daughter ('the complainant') in an oil-palm estate in 1996. On the day fixed for the hearing, the accused, being unrepresented, applied for legal aid, and the trial was postponed. At the next date of hearing, the accused sought another adjournment as counsel assigned to him by the Legal Aid Bureau was not present in court. The sessions judge refused the application and proceeded with the trial without the accused being represented by counsel. In her evidence-in-chief, the complainant alleged that the accused had also raped her a few times prior to the incident in 1996. At the close of the case for the prosecution, the charge against the accused was amended as regards the hour of the alleged rape, and three additional charges for rape were framed against the accused relating to similar offences allegedly committed in 1996, 1994 and 1991 respectively. The accused was then called upon to enter on his defence and he chose to make an unsworn statement from the dock, *videlicet*, that the allegations of rape against him were fabricated by the complainant at the behest of his adulterous wife. This statement was summarily rejected by the session judge as a bare denial, and the accused was convicted on all the four charges and sentenced to 18 years' imprisonment and two strokes of the whip in respect of each charge. The accused then appealed to the High Court but the learned judge dismissed it and affirmed the decision of the sessions judge. Before the justices of the Court of Appeal herein, the accused's primary ground of appeal was that he had been charged and tried at one trial for four similar offences allegedly committed within a span of five years – contrary to s.164(1) of the Criminal Procedure Code ('CPC') – and that this had rendered the trial a nullity.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The accused's complaint – that he had been charged and tried at one trial for four similar offences allegedly committed through a span of five years – was justified. Indeed, the accused was charged with committing four separate acts of rape which allegedly took place over a period of five years. This was a clear violation of s. 164(1) of the CPC, and the consequence was that the trial was a nullity. It was not a mere irregularity but an incurable illegality. (pp 383 a-h & 384 a)

[2] Since the accused was unrepresented by counsel and he had elected to make an unsworn statement from the dock, s. 257(1) of the CPC would apply. It was, therefore, incumbent upon the session judge to discharge the function mandated by s. 257(1) of the CPC, namely, to explain to the accused the principal points of the prosecution's evidence against him. On the grim facts of the instant case, the session judge's failure to do so had seriously prejudiced the accused. (pp 384 b-d & 385 b-d)

[2a] For the purposes of a trial, an unsworn statement from the dock is 'evidence'. Hence, an accused who elects to make an unsworn statement from the dock "elects to give 'evidence'". (pp 384 f-h & 385 a)

[3] In the course of the trial, the prosecution had adduced, without the leave of the court, similar fact evidence of previous acts of sexual intercourse that was highly prejudicial to the accused. The sessions judge ought to have intervened at once and asked the prosecution to justify the course it took, especially when the accused, a layman, was unrepresented by counsel. A trial court, in deciding whether to admit similar fact evidence, must weigh and balance up the probative value of such evidence against its prejudicial effect, as impliedly required by ss. 14 and 15 of the Evidence Act 1950. No such balancing exercise was carried out by the session judge here, nor was it ever shown that the probative value of the complainant's similar fact evidence would outweigh its prejudicial effect. This was a serious misdirection occasioning a grave miscarriage of justice. Indeed, the Sessions Court had acted on the similar fact evidence to add three further charges against the accused. (pp 385 f-h, 386 a-h & 387 a)

[4] Considering the seriousness of the charges against the accused and the fact that he was unrepresented by counsel at his trial, no serious injury would likely befall the criminal justice system had the sessions judge granted the accused the second adjournment he sought so as to enable him to engage an advocate. (p 387 b-c)

[5] All the critical errors in the accused's trial had occasioned a failure or miscarriage of justice, thus rendering the accused's conviction unsafe. This was also a case that was riddled with grave errors through poor investigation and prosecution. And, considering that the accused had already been imprisoned for seven years and that the original charge was in respect of an offence allegedly committed eight years ago, a retrial would no longer be appropriate here. (pp 387 d-f & 388 b-c)

Per curiam:

[1] It does not invariably follow that a charge that is lacking in a specific date is necessarily bad and warrants an acquittal. (p 388 d-f)

[Conviction quashed; sentence set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh dituduh di bawah s. 376 Kanun Keseksaan kerana merogol anak perempuannya yang berumur 15 tahun ('pengadu') di sebuah ladang kelapa sawit pada tahun 1996. Di hari yang ditetapkan untuk perbicaraan, tertuduh, yang tidak diwakili, memohon bantuan guaman, dan perbicaraan telah ditangguhkan. Pada tarikh pendengaran berikutnya, tertuduh memohon penangguhan lagi kerana peguam yang diperuntukkan kepadanya oleh Biro Bantuan Guaman tidak hadir di mahkamah. Permohonan bagaimanapun telah ditolak oleh hakim sesyen yang meneruskan perbicaraan tanpa tertuduh dibela oleh peguam. Dalam keterangan utamanya, pengadu mendakwa bahawa tertuduh juga telah beberapa kali merogolnya sebelum kejadian pada tahun 1996 itu. Di penutup kes pendakwaan, pertuduhan terhadap tertuduh dipinda berkaitan dengan waktu kejadian rogol tersebut, sementara tiga pertuduhan baru telah juga dikemukakan terhadapnya mengenai kesalahan serupa yang didakwa dilakukan masing-masing pada tahun 1996, 1994 dan 1991. Tertuduh kemudian dipanggil untuk membela diri dan beliau memilih untuk memberi keterangan dari kandang, iaitu, bahawa dakwaan-dakwaan rogol terhadapnya adalah direka oleh pengadu atas dorongan isterinya yang curang. Kenyataan ini ditolak oleh hakim sesyen sebagai penafian semata-mata, dan tertuduh disabitkan atas keempat-empat pertuduhan dan dihukum penjara selama 18 tahun dan dua sebatan bagi setiap pertuduhan. Tertuduh kemudian merayu ke Mahkamah Tinggi tetapi rayuannya ditolak oleh yang arif hakim yang mengekalkan keputusan hakim sesyen. Di hadapan hakim-hakim Mahkamah Rayuan di sini, alasan utama rayuan perayu adalah bahawa beliau telah dituduh dengan dan dibicarakan atas empat pertuduhan dalam satu perbicaraan di mana kesemua pertuduhan tersebut didakwa berlaku dalam tempoh lima tahun – yang mana ianya bertentangan dengan s. 164(1) Kanun Prosedur Jenayah ('CPC') – menyebabkan perbicaraannya menjadi tak sah.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Bantahan tertuduh – bahawa beliau telah dituduh dan dibicarakan dalam satu perbicaraan atas empat kesalahan serupa yang dikatakan dilakukan dalam tempoh lima tahun – adalah berjustifikasi. Malah, tertuduh sememangnya dituduh dengan empat perbuatan rogol berasingan yang

didakwa dilakukan dalam tempoh lima tahun. Ini jelas menyalahi s. 164(1) CPC, dan akibatnya perbicaran menjadi tak sah. Ini bukan semata-mata suatu luar aturan tetapi suatu ketaksahan yang tidak dapat dipulihkan.

[2] Oleh kerana tertuduh tidak diwakili peguam dan memilih untuk memberi keterangan tanpa bersumpah dari kandang, s. 257(1) CPC terpakai. Hakim sesyen dengan itu berkewajipan untuk menunaikan fungsi yang ditetapkan oleh s. 257(1) CPC, iaitu, menerangkan kepada tertuduh akan unsur-unsur penting keterangan pihak pendakwaan terhadapnya. Berdasarkan fakta malang kes ini, kegagalan hakim sesyen berbuat demikian telah dengan seriusnya memprejudiskan tertuduh.

[2a] Bagi maksud perbicaraan, keterangan tak bersumpah dari kandang adalah 'keterangan'. Oleh itu, seorang tertuduh yang memilih untuk membuat kenyataan tak bersumpah dari kandang telah 'memilih' untuk memberi 'keterangan'.

[3] Semasa perbicaraan, pendakwaan telah mengemukakan, tanpa kebenaran mahkamah, keterangan fakta serupa berkaitan perbuatan perlakuan seks terdahulu yang memprejudis tertuduh. Hakim sesyen sepatutnya campur tangan dengan serta merta dan meminta pendakwaan menjustifikasikan jalan yang diambilnya itu, lebih-lebih lagi apabila tertuduh, seorang orang awam, tidak diwakili peguam. Sebuah mahkamah bicara, apabila memilih untuk menerima masuk keterangan fakta serupa, hendaklah menimbang dan meneliti nilai probatif keterangan tersebut berbanding dengan kesan prejudisnya, sebagaimana disiratkan oleh ss. 14 & 15 Akta Keterangan 1950. Pertimbangan sedemikian tidak dibuat oleh hakim sesyen di sini, dan begitu juga, ianya tidak ditunjukkan bahawa nilai probatif keterangan fakta serupa oleh pengadu akan mengatasi kesan prejudisnya. Ini suatu salah arahan yang serius yang mengakibatkan salah laksana keadilan yang berat. Hakim sesyen malahan telah bertindak atas keterangan fakta serupa dengan menambah tiga lagi pertuduhan terhadap tertuduh.

[4] Mengambil kira keseriusan pertuduhan yang dihadapkan kepada tertuduh dan fakta bahawa beliau tidak diwakili peguam di perbicaraannya, tiada masaalah akan timbul ke atas sistem keadilan jenayah sekiranya hakim sesyen membenarkan penangguhan yang diminta oleh tertuduh bagi membolehkannya mendapat khidmat guaman.

[5] Kesilapan-kesilapan kritikal dalam perbicaraan tertuduh telah menyebabkan kegagalan atau salah laksana keadilan, sekaligus menjadikan sabitan terhadapnya tidak selamat. Ini juga merupakan suatu kes yang penuh dengan kesilapan berat, yang disebabkan oleh penyiasatan dan pendakwaan yang lemah. Dan, memandangkan bahawa tertuduh telah pun terpenjara selama tujuh tahun dan bahawa pertuduhan asal adalah berkaitan kesalahan yang dikatakan dilakukan lapan tahun lalu, perbicaraan semula untuk kes ini adalah tidak wajar.

Per curiam:

[1] Adalah tidak semestinya bahawa sesuatu pertuduhan yang tidak mengandungi tarikh yang spesifik itu cacat dan wajar mendapat pembebasan.

Sabitan dibatalkan; hukuman diketepikan.]

Case(s) referred to:

Awaluddin Suratman & Ors v. PP [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310 HC ***(refd)***
Boardman v. Director of Public Prosecutions [1975] 3 AC 421 ***(refd)***
Chin Choy v. PP [1955] MLJ 236 ***(foll)***
Director of Public Prosecutions v. P [1991] 2 AC 447 ***(refd)***
Junaidi Abdullah v. PP [1993] 3 MLJ 217 ***(refd)***
Kiew Foo Mui v. PP [1996] 1 CLJ 14 SC ***(refd)***
Krishna Murthy v. Abdul Subban [1965] 1 Cr LJ 565 ***(foll)***
Lee Kwang Peng v. PP [1997] 3 SLR 278 ***(refd)***
Lokhman Abu v. PP [2001] 1 CLJ 253 CA ***(foll)***
Low Thim Fatt v. PP [1989] 1 MLJ 304 ***(not foll)***
Manokaran v. PP [1979] 1 MLJ 262 ***(refd)***
Mohamed Din v. PP [1985] 2 MLJ 251 ***(refd)***
Ng Hoi Cheu v. PP [1968] 1 MLJ 53 ***(foll)***
Por Choo Aik v. PP [1993] 2 MLJ 131 ***(refd)***
PP v. Sanassi [1970] 2 MLJ 198 ***(not foll)***
PP v. Teo Ai Nee [1995] 2 SLR 69 ***(refd)***
R v. Police Commissioner of the Metropolis ex p Blackburn (No 2) [1968] 2 QB 150 ***(refd)***
R v. Saunders [1974] 58 Cr App R 248 ***(refd)***
R v. Scarrott [1978] QB 1016 ***(foll)***
Shaari v. PP [1963] MLJ 22 ***(refd)***
Subramania Iyer v. King Emperor LR 28 IA 257 ***(foll)***
Tan Foo Su v. PP [1967] 2 MLJ 19 ***(foll)***
Tan Meng Jee v. PP [1996] 2 SLR 422 ***(foll)***
Wong Heng Fatt v. PP [1959] MLJ 20 ***(not foll)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 164(1), 257(1), 422
Emergency Regulations 1948, regs. 4(1)(b), 5(1)
Evidence Act 1950, ss. 14, 15

Criminal Procedure Code 1898 [India], ss. 234(1), 537

For the appellant - Mura Raju; M/s Mura Raju & Co
For the respondent - Tengku Amir Zaki Tengku Hj Abdul Rahman DPP

Reported by Alex KC Lee

JUDGMENT

Gopal Sri Ram JCA:

The appellant in this case was first produced before the Sessions Court at Temerloh on 26 January 1997 and charged as follows:

> That you in early December, 1996, at about 8.30 p.m., in the oil palm estate, Jalan Highway Mentakab – Temerloh District of Temerloh, Pahang did rape a girl named SURIAMIZAN BINTI AZAHAN KPT:810114-06-5246, aged 15 years. You have thereby committed an offence punishable under s. 376 of the Penal Code.

The appellant claimed trial to the charge and the court fixed 8 January 1998 for hearing. However, when the case was called on for trial on that date, the appellant applied for legal aid. The record shows that the matter was then postponed to 24 June 1998. On the appointed day the appellant who was present applied for an adjournment as his counsel who was apparently supposed to come from Raub had not arrived. The court refused the adjournment and proceeded with the trial. The accused did not therefore have the benefit of representation by a lawyer. In this context we pause to observe two matters. First, the appellant had been in police custody from the date of his arrest and in judicial custody from the date of his first production in court. Second, from the appellant's submission at the close of the prosecution case it appears that he was seen in prison by one Mr. Phillip Loh, counsel assigned by the Legal Aid Bureau. The significance of these matters will appear later in this judgment.

The principal witness for the prosecution (PW2) was the appellant's daughter, a 15 year old child. She gave evidence in chief of the incident that formed the subject matter of the charge. We must pause at this juncture to say that the notes of evidence have been poorly recorded. We have therefore encountered considerable difficulty in discerning portions of the evidence,

particularly the cross-examination of PW2 by the appellant. However, it appears that in the course of her evidence in chief, the officer prosecuting the case must have asked her whether there had been previous incidents of sexual intercourse because we see from the record PW2 saying that there had been other incidents. She then referred to an incident in her grandmother's house in or about 1995, and other earlier incidents going back to 1991.

This method of adducing evidence is most unsatisfactory. It reflects poorly upon the way in which the case was handled in its pre-trial stages. It points to the original complaint by PW2 not having been thoroughly investigated by the police. Alternatively, the Deputy Public Prosecutor entrusted with giving directions in the matter had completely overlooked the reference to other incidents in PW2's statement recorded under s. 112 of the Criminal Procedure Code ("the Code"). Were it otherwise, we are quite certain that the prosecution would have framed a charge in respect of each of the alleged incidents of rape. But the impression – and it is an adverse impression – that has been created by the way in which the trial proceeded is that the case was being investigated into for the very first time in the course of the hearing. We cannot deprecate in terms too strong the unsatisfactory and amateurish way in which this case was handled by both the investigating agency and those in conduct of the prosecution.

To return to the narrative, at the conclusion of the prosecution's case, in consequence of the matters arising from PW2's evidence, four charges were framed against the appellant. This included the original charge marked as exh. P11 which had been amended as to the time of the alleged incident. The four charges (marked from P11 through P14) are as follows:

The First Amended Charge (P11)

That you in early December, 1996, at about 2.30 p.m., in the oil palm estate, Jalan Highway Mentakab – Temerloh, in the District of Temerloh, Pahang did rape a girl named SURIAMIZAN BINTI AZAHAN KPT:810114-06-5246, age 15 years. You have thereby committed an offence punishable under s. 376 of the Penal Code.

The Second Charge (P12)

That you, on a Sunday in the year 1994, in the house No. 137, Desa Murni, Sanggang in the District of Temerloh, Pahang, did commit an offence of rape on SURIAMIZAN BINTI AZAHAN (KP No. 810114-06-5246) age 13 years. You have thereby committed an offence punishable under s. 376 of the Penal Code

The Third Charge (P13)

That you, on a Friday in the year 1996, at about 1.30 p.m., in the palm oil estate, KM22, Jalan Temerloh – Jerantut, in the District of Temerloh, Pahang, did commit an offence of rape on SURIAMIZAN BINTI AZAHAN (KP No. 810114-06-5246) age 15 years. You have thereby committed an offence punishable under s. 376 of the Penal Code

The Fourth Charge (P14)

That you, in 1991, in house No.32, Kampung Baru Sanggang, in the District of Temerloh, did commit an offence of rape on SURIAMIZAN BINTI AZAHAN (KP No. 810114-06-5246) age 10 years. You have thereby committed an offence punishable under s. 376 of the Penal Code

The record shows that these charges were read out to the appellant. However there is nothing to show that the prosecution's evidence was explained to the appellant as required by s. 257 of the Code.

To complete the narrative, when the court called on him to make his defence to the charge, the appellant elected to make an unsworn statement from the dock. In that statement he appears to have said that the case had been hoisted on him by his adulterous wife who had put the complainant up against him. We say "appears" advisedly because the appellant's statement as recorded by the court is fragmented and rather brief. It also appears from the notes recorded by the court that it summarily rejected the appellant's unsworn statement as a bare denial. The court then convicted the appellant on all 4 charges and sentenced him to 18 years imprisonment and 2 strokes of the rattan on each charge. The appellant appealed to the High Court which merely endorsed the sessions court's findings and held that there had been no procedural error by the trial court.

Before us, learned counsel for the appellant argued several grounds on which he said the conviction should be quashed. We find it unnecessary to deal with all of them.

The main question in the present instance is whether the four charges were regularly tried. On this point s. 164(1) of the Code is relevant. It reads:

164(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.

The complaint here is that the appellant was tried for more than three offences of the same kind allegedly committed within the space of more than twelve months. The complaint is justified because the appellant was charged with committing 4 separate acts of rape over a period of five years. There has therefore been a violation of s. 164(1) of the Code. The question that arises is this. What is the consequence of the breach? It is the unanimous view of the several decisions on the Indian equipollent of the section that the trial is a nullity. We find it unnecessary to discuss all the authorities here. Suffice that we mention two.

In *Subramania Iyer v. King Emperor* LR 28 IA 257, the appellant was charged with 41 acts extending over a period of two years. The Privy Council quashed the convictions and held that a breach of s. 234(1) of the Indian Criminal Procedure Code 1898, (which is ipsissima verba our s. 164(1)) is an illegality and not curable under s. 537 (our s. 422). Lord Halsbury LC said:

> Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant.

Subramania Iyer v. King Emperor was applied in *Chin Choy v. Public Prosecutor* [1955] MLJ 236. In that case, the accused was charged with two offences of consorting contrary to reg. 5(1) of the Emergency Regulations 1948, one offence of being in possession of a revolver contrary to reg. 4(1)(a) of the Emergency Regulations 1951 and one offence of being in possession of ammunition contrary to regulation 4(1)(b) of the Emergency Regulations 1951. The period which these offences covered was from 1948 to 1955. The accused pleaded guilty to two charges of consorting. Yet, the Court of Appeal of Malaya quashed the convictions on the possession charges and ordered a re-trial. Matthew CJ rejected the prosecution's contention that there had been a regular trial in the following passage:

> The learned Deputy Public Prosecutor has submitted that, as a plea of guilty to the charges relating to consorting was accepted and a conviction recorded, the trial took place only as to the charges of possession, and to this joinder no exception can be taken. We do not agree. The appellant was required to plead to four charges which were wrongly joined, and the fact that he pleaded guilty to two of them does not cure the original illegality. Support for this view is to be found in *Krishmaswami Pillai v. King-Emperor* 26 Mad 125.
>
> We accordingly quash the convictions, and order a re-trial as to the charges relating to possession contrary to regulations 4(1)(a) and 4(1)(b) of the Emergency Regulations 1951.

Applying these authorities to the present case, we are constrained to hold that the trial of the appellant was a nullity and must be quashed. The only question is whether a re-trial should be ordered.

Strictly speaking, that should be the end of the matter. However, there are other aspects of this case, special to its facts that need to be addressed. One of these has to do with the failure of the sessions court to act in accordance with s. 257(1) of the Code. The section is most relevant to this case because, as we have already pointed out in para. 2 of this judgment the appellant was undefended by counsel. The section reads:

> At every trial before the court of a magistrate if and when the court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

The first point to note about the section is that it has no parallel in either the Indian or the Singapore Criminal Procedure Codes. The second is that the section only casts a burden on the court if the accused – to quote the section – "elects to give evidence". The critical question at issue here is whether the appellant who elected to make an unsworn statement from the dock "elected to give evidence".

Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v. Public Prosecutor* [1959] MLJ 20, *Public Prosecutor v. Sanassi* [1970] 2 MLJ 198, and *Low Thim Fatt v. Public Prosecutor* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J in *Ng Hoi Cheu v. Public Prosecutor* [1968] 1 MLJ 53 held that it is evidence. And there are *dicta* in many other cases, Malaysian, Australian and at least one decided by the Privy Council which say quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Professor Ahmad Ibrahim in [1975] 2 MLJ vi. The other is by Professor Mohd Akram in [2003] 1 MLJ clxix.

In our judgment, in the context of s. 257(1) the critical phrase is "elects to give evidence" and not "elects to give evidence on oath". The former is much wider than the latter and must *ex necessitae rei* include the making of an unsworn statement from the dock. We are therefore persuaded that the

reasoning of Chang Min Tat J in *Ng Hoi Cheu v. Public Prosecutor* is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of s. 257(1).

The section has been considered by the High Court in a number of cases including, *Shaari v. Public Prosecutor* [1963] MLJ 22, *Awaluddin bin Suratman & Ors v. Public Prosecutor* [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310, *Por Choo Aik v. Public Prosecutor* [1993] 2 MLJ 131 and by this court in *Lokhman bin Abu v. Public Prosecutor* [2001] 1 CLJ 253. In the last of these cases, we had the opportunity to observe that the failure to comply with s. 257(1) "would attract different consequences in each case, according to its own facts." That is a view to which we adhere. The question is whether on the facts of the present case, the failure by the sessions court to comply with the section has seriously prejudiced the appellant. We think it has.

This is a most serious case where the appellant was facing four charges at the end of the prosecution's case. Three of those charges came at the end of the case for the prosecution. In respect of some of these charges, there was, as we have already observed, insufficient particulars as to the date of the offence thereby wholly or substantially removing any possibility of a defence of alibi being raised by the appellant. In these circumstances, it was, in our view, incumbent upon the sessions court to discharge the function mandated by s. 257(1).

Further, this was a case where the appellant had come into court prepared to face a single charge. However, the prosecution in the course of the trial had, without seeking the leave of the court, adduced highly prejudicial similar fact evidence of previous acts of sexual intercourse. Once the question was put as to previous acts, the normal course for the sessions court to have taken is to have intervened at once and asked the prosecuting officer to justify the course he proposed to embark upon. This was especially necessary since the accused, a layman, was unrepresented by counsel. We find this to be a most unsatisfactory feature of this case.

A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss. 14 and 15 of the Evidence Act 1950. The court would be justified in admitting the evidence where *[its probative value is outweighed by its prejudicial effect.]* See, *Boardman v. Director of Public Prosecutions* [1975] 3 AC 421; *Director of Public Prosecutions v. P* [1991] 2 AC 447; *Junaidi bin Abdullah v. Public Prosecutor* [1993] 3 MLJ 217; *Public Prosecutor v. Teo Ai Nee* [1995] 2 SLR 69; *Tan Meng Jee v. Public Prosecutor* [1996] 2 SLR 422; *Lee Kwang Peng v. Public Prosecutor* [1997] 3 SLR 278.

In *Tan Meng Jee v. Public Prosecutor* Yong Pung How CJ when delivering the judgment of the Singapore Court of Appeal said of the equipollent provisions in the Singapore Evidence Act:

> Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss. 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in Boardman's case. Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused – based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence.

With respect we entirely agree with the aforesaid dictum, coming as it does from so authoritative a source as His Honour the Chief Justice of Singapore. Further, like His Honour, we also find Illustration (o) to s. 14 of the Evidence Act to be relevant. That Illustration reads:

> A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

So, here too, PW 2's evidence as to the appellant's previous acts of intercourse with her was relevant, that is to say, admissible. But that does not, on the authorities we have cited, relieve the court of determining whether the probative value of her evidence outweighed its prejudicial effect. We have carefully examined the record and nowhere in the judgment of the sessions court is there the kind of balancing exercise dictated by ss. 14 and 15 of the Evidence Act. This is a serious misdirection. It occasioned a serious miscarriage of justice as the sessions court acted on the similar fact evidence to add three further charges against the appellant.

In the context of the similar fact evidence in this case we find it useful to recall the words of Scarman LJ in *R v. Scarrott* [1978] QB 1016:

> Positive probative value is what the law requires, if similar fact evidence is to be admissible. Such probative value is not provided by the mere repetition of similar facts; there has to be some feature or features in the evidence sought to be adduced which provides a link, an underlying link as it has been called in some of the cases. The existence of such a link is not to be inferred from

> mere similarity of facts which are themselves so commonplace that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration.

There is another unsatisfactory feature in this case. As we have said earlier, the appellant was unrepresented at the trial. The case had been adjourned only once before to enable him to engage counsel. On the second occasion he had asked for a postponement of the case once again to enable him to obtain legal representation. Considering the serious nature of the charge framed against him, we do not see what injury the justice system would have suffered if the sessions court had granted his request. As Raja Azlan Shah J (as he then was) said in *Tan Foo Su v. Public Prosecutor* [1967] 2 MLJ 19, albeit in the context of granting an adjournment of a trial to enable the calling of a witness:

> Every latitude must be given to an accused person to defend his case and to call witnesses, more so when the accused person is not represented.

When we put some of the several unsatisfactory features in this case to the learned deputy, he was unable to advance any argument in reply. His only response was that he left the matter to the court, a response described by Abdoolcader J in *Manokaran v. Public Prosecutor* [1979] 1 MLJ 262 as

> a supplication or formula or call it what you will which, with respect, has since become the stock answer and the standard and perhaps last refuge of the desperate.

In the light of all the serious errors we have adumbrated it was clear that the appellant's conviction was unsafe and that that there had been occasioned a failure or miscarriage of justice. We pause now to remind ourselves of the approach of our courts to cases as the present by quoting the following passage from the judgment of Hegde J in *Krishna Murthy v. Abdul Subban* [1965] 1 Cr LJ 565, which was applied with approval by the High Court in *Mohamed Din v. Public Prosecutor* [1985] 2 MLJ 251 and the Federal Court in *Kiew Foo Mui v. Public Prosecutor* [1996] 1 CLJ 14:

> The expression 'a failure of justice has in fact occasioned thereby' found in Section 535(1), Cr. PC [which is section 422 of the Code] does not connote that the Court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the Legislature need not have introduced the conception of 'failure of justice' in sections 535 and 537, Cr. PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr. PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr. P.C. have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One

> of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

To sum-up, this is a case riddled with serious errors because of poor investigation and prosecution. Additionally, the sessions court failed to observe provisions of the Code and the Evidence Act. No suggestion was made by the learned deputy that a re-trial should be ordered. In any event, we do not consider this to be a proper case to order a re-trial. The appellant had already served seven years imprisonment. In accordance with the settled practice of appellate courts, re-trials are generally not ordered in cases where the case has been pending against an accused for about four years. See *R v. Saunders* [1974] 58 Cr App R 248. The original charge was in respect of an offence allegedly committed eight years ago. A re-trial is therefore not appropriate on the facts of this case.

We would add this postscript. This judgment does not break new ground. It merely applies settled principles of law to the particular and peculiar facts of this case. It certainly does not establish the proposition that a charge wanting of a specific date is bad and warrants an acquittal. This court is certainly not responsible for any erroneous misapprehension to the contrary in the minds of persons who have not read this judgment. As members of an independent judiciary it does not behove us to answer each and every unwarranted or misinformed criticism of our decisions or judgments. We must by the very nature of our office remain silent at any and all brickbats hurled at us. We may only seek vindication for our decisions through our reasoned judgments. As the great Lord Denning MR said in *R v. Police Commissioner of the Metropolis ex parte Blackburn (No. 2)* [1968] 2 QB 150:

> All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

For the reasons already given the appeal was allowed, the conviction quashed and the sentence set aside.